

JUDICIAL REVIEW IN INDIA: LIMITS AND POLICY

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I. INTRODUCTION

[T]he petitioners [in *Golak Nath's* case] left the Court with the consolation that posterity will enjoy the fruits of the walnut tree planted by them. But it looks as if a storm is brewing threatening the very existence of the tree.¹

In these words, Mr. Justice Chandrachud described the event of the phenomenal overruling of the famous *Golak Nath*² decision by ten out of thirteen judges in *Kesavananda Bharati v. State of Kerala*.³ These two cases dealt with the most fundamental issues of constitutional review and stirred much greater controversy in the legal world than even *Marbury v. Madison*⁴ did in the past. *Marbury* was not unknown to legal theory because its ultimate source lay in the ancient doctrine of *ultra vires*. What made the American Court's assertion of judicial review unique was the fact that it inferred that power from the structure of the United States Constitution. In India, judicial review based on the doctrine of *ultra vires* dates back to the inception of British rule.⁵ Therefore, the legitimacy of judicial review has never been an issue. Although article 13(2) of the Indian Constitution says specifically that a law inconsistent with the fundamental rights guaranteed by part III is void, the Indian Supreme Court made it clear in one of the earliest cases that the power of judicial review is inherent in a written constitution and exists independently of article 13(2).⁶

The Indian Constitution is very specific and detailed; thus the Indian Supreme Court started with a disadvantage. Considering this disadvantage, it has struggled hard to retain as much judicial review as possible. *Golak Nath* and *Kesavananda* both were assertions of the finality of decision-making power by the Court against Parliament. In this respect the cases resemble *Marbury*. But whereas *Marbury* established the finality of the Court's decisions against Congress, *Golak Nath* and *Kesavananda* sought to do so against amendment to the constitution. 'The re-

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¹ *Kesavananda Bharati v. State of Kerala*, [1973] 60 All India Rptr. 1461, 2032 (Sup. Ct.).

² *Golak Nath v. State of Punjab* [1967] 54 All India Rptr. 1643 (Sup. Ct.).

³ [1973] 60 All India Rptr. 1461 (Sup. Ct.).

⁴ 5 U.S. (1 Cranch) 137 (1803).

⁵ See *The Empress v. Burah and Book Singh*, [1878] 3 Indian L.R. 63, 87-88 (Calcutta).

⁶ *A. K. Gopalan v. State of Madras*, [1950] 37 All India Rptr. 27, 34 (Sup. Ct.).

versal of *Golak Nath* shows that ultimately the finality of judicial decisions cannot be established through legal logic alone.

The *Kesavananda* case raised questions of crucial importance for the future of the Indian Constitution as well as Indian democracy. From the close division among judges on the scope of Parliament's power of constitutional amendment as well as judicial review of eminent domain, two clear alternatives regarding the role of a constitutional court in a democratic society emerge. The *Kesavananda* Court was faced with a difficult choice. On the one hand, it had before it the decision in *Golak Nath*, which imposed an embargo on future amendments of the fundamental rights, and on the other, it had before it an amendment which sought to completely eliminate judicial review. The dilemma of the majority justices was how to concede the power of constitutional amendment to Parliament, which legal logic required them to do, and at the same time save judicial review. Their decision, although equally vulnerable from the standpoint of logic as that of *Golak Nath*, has to be understood in the light of such a dilemma.

II. BACKGROUND OF THE CONFLICT

We cannot conclusively say whether the present conflict between Parliament and the Supreme Court is purely institutional, *i.e.* arises from their rival claims for finality of decision-making, or whether it is ideological. In the course of this article we shall try to answer this question, though the question is elusive and any effort to answer it is bound to produce only a tentative answer.

There was some ambivalence on the part of the drafters of the Indian Constitution regarding judicial review. While the drafters included a declaration of fundamental rights and provided for judicial review, they also sought to make the constitution detailed and specific with a view to leaving the minimum of discretion to the judges. Nehru's speech in the Constituent Assembly that no court would stand in the way of social reform and that ultimately the constitution itself was a creature of Parliament showed his distrust of the judges' capacity to adjudicate on social policy.⁷ The deletion of a "due process" clause was motivated by the desire to avoid the kind of confrontation which the United States had witnessed in the *Dred Scott* and the New Deal cases between Congress and the Court.⁸

However, a written constitution with a bill of rights can hardly ever

⁷ See CONSTITUENT ASSEMBLY DEBATES 1195-96.

⁸ See G. AUSTIN, *THE INDIAN CONSTITUTION: THE CORNERSTONE OF A NATION* 84-87 (Oxford Indian Ed. 1972); and S. B. RAO, *FRAMING OF INDIA'S CONSTITUTION* 231-38 (1968).

become so definite and certain as to let the courts function as mere slot machines. The Indian Supreme Court started its career as a constitutional court with an extremely positivist attitude. It held in *A. K. Gopalan v. State of Madras*⁹ that the words "procedure established by law" in article 21 of the constitution¹⁰ meant the procedure prescribed by an enacted law. The Court refused to extend the protection of the rules of natural justice to a person detained under the law of preventive detention.¹¹ This initial diffidence, however, was soon abandoned and the Court acknowledged in a later case that although it did not act "to tilt at legislative authority in a crusader's spirit," its constitutional role was that of the "sentinel on the 'qui vive'" as to the fundamental rights.¹² Mr. Chief Justice Patanjali Sastri observed that it was "inevitable that the social philosophy and the scale of values of the [j]udges participating in the decision should play an important part" in constitutional decision-making but warned that the judges must exercise the power of judicial review with restraint.¹³ Later, the Court was to deal with complex social questions such as: can fundamental rights be waived;¹⁴ can there be a total ban on the slaughter of cows;¹⁵ can a state university change the medium of instruction from English to a regional language;¹⁶ how much protective discrimination for backward sections of people is valid and how should it be reconciled with the guarantee of equal protection of laws.¹⁷

It is only on the right to property guaranteed by article 31 of the constitution¹⁸ that the Court and Parliament came to adopt entirely contradictory positions. Most of the amendments to the Indian Constitution which restricted fundamental rights curbed property rights, and most of them were aimed at rejecting the judicial interpretation given by the Court. In the original constitution itself, the land reform legislation had been excluded from the protection of article 31.¹⁹ But when the Patna High Court invalidated such legislation on the ground that it violated the

⁹ [1950] 37 All India Rptr. 27 (Sup. Ct.).

¹⁰ CONSTITUTION OF INDIA, art. 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

¹¹ For a criticism of this decision, see E. MCWHINNEY, JUDICIAL REVIEW 132-36 (2d ed. 1969).

¹² *State of Madras v. V. G. Row*, [1952] 39 All India Rptr. 196, 199 (Sup. Ct.).

¹³ *Id.* at 200.

¹⁴ *Basheshar Nath v. Commissioner of Income Tax*, [1959] 46 All India Rptr. 149 (Sup. Ct.).

¹⁵ *M. H. Quareshi v. State of Bihar*, [1958] 45 All India Rptr. 731 (Sup. Ct.).

¹⁶ *Gujarat University v. Shri Krishna*, [1963] 50 All India Rptr. 703 (Sup. Ct.).

¹⁷ *M. J. Balaji v. State of Mysore*, [1963] 50 All India Rptr. 649 (Sup. Ct.).

¹⁸ See Appendix, *infra*, at 895.

¹⁹ CONSTITUTION OF INDIA, art. 31, clauses (4) and (6).

right to equality,²⁰ the first amendment was enacted to bring two new articles, 31-A and 31-B, into the constitution. These articles extended the immunity of social reform legislation against other fundamental rights also. The scope of these articles was expanded by the subsequent amendments.²¹

In *Subodh Gopal*²² and *Dwarkadas*,²³ the Supreme Court interpreted article 31 in such a way that compensation became payable even when a person was deprived of his property by the exercise of the state's police power. Both decisions were given by a majority of four against one. Mr. Justice S. R. Das (who later became the Chief Justice), in his dissenting judgment, held that the liability to pay compensation arose only when property was acquired by the state. In other words, he would have restricted the liability to the cases of eminent domain only. In *Bella Banerjee*,²⁴ the Court held unanimously that the word "compensation" meant the just equivalent of the value of property. According to the Court, the market value was the essential criterion of compensation. These decisions were overturned by the fourth amendment which made it explicit that compensation need be paid only when property was transferred to the state and that the adequacy of compensation was not justiciable.²⁵

The express words of the constitution prevented the Court from reviewing compensation. The Court acquiesced in this in the beginning.²⁶ But in *Vajravelu*,²⁷ a five judge bench led by Chief Justice Subba Rao held that even after the fourth amendment the Court had the power to review compensation or the principles for fixing compensation with a view to ensuring that it was the just equivalent of the value of property. Since Parliament had used the word "compensation" even after the enactment of the fourth amendment, it had approved the meaning which the Court gave to it in *Bella Banerjee*. On this basis the Court said that while the adequacy could not be reviewed, the relevancy of the principles of compensation could be reviewed. The question remains: relevancy to

²⁰ Kameshwar Singh v. State of Bihar, [1951] 38 All India Rptr. 91 (Patna).

²¹ CONSTITUTION OF INDIA, art. 31-B, states that the acts and regulations specified in schedule nine shall not be void on the ground that they are inconsistent with the fundamental rights.

²² State of West Bengal v. Subodh Gopal, [1954] 41 All India Rptr. 92 (Sup. Ct.).

²³ Dwarkadas v. Sholapur Spinning and Weaving Co., [1954] 41 All India Rptr. 119 (Sup. Ct.). For a critique of these two cases, see P. TRIPATHI, SOME INSIGHTS INTO FUNDAMENTAL RIGHTS, *Lecture IV* 211-60 (University of Bombay 1972).

²⁴ State of West Bengal v. Bella Banerjee, [1954] 41 All India Rptr. 170 (Sup. Ct.).

²⁵ See Appendix, *infra*, at 896.

²⁶ Burrakur Coal Co. v. Union of India, [1961] 48 All India Rptr. 954 (Sup. Ct.).

²⁷ Vajravelu v. Special Duty Collector, [1963] 52 All India Rptr. 1017 (Sup. Ct.).

what? Such relevancy could be determined only in terms of the market value. Therefore, it was impossible to review the relevancy without reviewing the adequacy. The Court probably was content to restrict its intervention to cases of gross abuse of power by the legislature. Even in the Constituent Assembly Nehru had conceded that the courts could intervene in the matter of compensation when it was illusory.²⁸ The Court's verdict therefore might have reinstated judicial review partially. However, the line dividing "illusory" from "inadequate" is so thin that either the Court may not intervene at all and thus may totally abdicate its authority or it may intervene too often. In *Vajravelu*, the Court did not strike down the law on the ground of compensation. It chose to strike it down on the ground that it was discriminatory, since it paid less compensation than was payable under another similar statute which coexisted with it.

In subsequent cases, the Court struck down the laws in the *Metal Corporation*²⁹ and *Bank Nationalisation*³⁰ cases. In both cases one could not say that the compensation was illusory although it was definitely inadequate. Thus the Court had almost nullified the fourth amendment. Only once between the *Metal Corporation* and *Bank Nationalisation* cases, in *Shantilal*,³¹ the Court held that the compensation was absolutely unreviewable. In fact, the need for judicial intervention was greater in *Shantilal* than in the other two cases because this was a clear case of illusory compensation. Here, for a property which was acquired under the Bombay Town Planning Act in 1965, compensation was given at the rate of its market value in 1942. The Court could have struck down the executive action alone and thus prevented this unjust result. But the decision virtually "constitutionalizes confiscation."³² *Shantilal* showed the ambivalence of the judicial attitude on the question of compensation. Such ambivalence is also to be seen in the observation of Mr. Justice Hidayatullah in *Golak Nath*, that among all of the fundamental rights, the right to property was the weakest.³³ Nevertheless, in all of the above decisions, the judges on the whole leaned heavily in favour of judicial review of compensation.

As a result of the judicial favoritism of compensation, the Supreme Court is often accused of having espoused the property rights at the cost

²⁸ 9 CONSTITUENT ASSEMBLY DEBATES 1193.

²⁹ *Union of India v. Metal Corp. of India*, [1967] 54 All India Rptr. 637 (Sup. Ct.)

³⁰ *Cooper v. Union of India*, [1970] 57 All India Rptr. 564 (Sup. Ct.).

³¹ *State of Gujarat v. Shantilal*, [1969] 56 All India Rptr. 634 (Sup. Ct.).

³² Baxi, *State of Gujarat v. Shantilal: A Requiem for "Just Compensation"*, 9 JAHN'ER L.J. 29, 32 (1969).

³³ [1967] 54 All India Rptr. 1643, 1710 (Sup. Ct.).

of social justice. But there appears to be an inner contradiction in the constitution itself. If the constitution-makers did not want reviewability of compensation, the best course for them would have been to provide only the guarantee in clause (1) of article 31, which states that a person should not be deprived of property without the authority of law. Why did they provide the guarantee of compensation in clause (2) at all? If compensation is to be given, it has to be adequate and just. But what is adequate compensation? Adequate for whom? If we say that it should be adequate according to the owner, then even the market value may not always be adequate. Seervai defines market value as the price a free willing buyer is prepared to offer to a free willing seller.³⁴ But does not the concept of eminent domain exclude there being a free willing seller? Because, according to it, the state does not decide to acquire property with the consent of the property owner. It is a compulsory sale. This element of compulsion may make even the market value prevailing at a time inadequate. When the state acquires property, it must pay compensation which is adequate at that time, independently of whether the owner of the property considers it to be adequate. Such adequacy will have to be determined in the light of a variety of social and economic factors — the capacity of the state to pay being one of them. But the policy of acquisition must be overall and uniform. If in each case the legislature determines compensation according to different sets of principles, injustice may result. *Shantilal* exposes the injustice and contradiction very tellingly. At the same time *Bank* shows how excessive reliance by the judiciary on standards derived from a free market economy may impose a heavy burden on society. These two cases illustrate how the illusory compensation test can result in either abdication of judicial review or over-exercise of it.

III. AMENDABILITY OF FUNDAMENTAL RIGHTS: 1950 TO 1967

The above analysis suggests that Parliament had succeeded in overriding the decisions of the Court by amending the constitution. Article 368 of the constitution provides for its amendment. A bill for amendment can be passed with the support of two thirds of the members present and voting and an absolute majority of the total membership of each House of Parliament. In respect of certain articles of the Constitution which have been enumerated in the proviso, an amendment is further required to be ratified by not less than half the state legislatures, after it is passed by Parliament in the above manner. After it is so passed and rati-

³⁴ H. Seervai, CONSTITUTIONAL LAW OF INDIA 559 (1968).

fied as required, it is presented to the President for his assent, and upon obtaining such assent, the constitution stands "amended in accordance with the terms of the bill."³⁵

Having lost hope that the Court would protect private property, the property owners tried to attack the power of amendment itself. This was done first in 1951 in *Shankari Prasad*³⁶ and again in 1965 in *Sajjan Singh*.³⁷ It was contended that an amendment was "law" for the purpose of article 13(2), which says that the state shall not make any law which may take away or abridge the fundamental rights. Hence an amendment of the Constitution which abridged or took away the fundamental rights was void. In *Shankari Prasad* the validity of the first amendment, and in *Sajjan Singh* the validity of the seventeenth amendment, were challenged. Both times this contention was rejected on the ground that there was distinction between ordinary law and constitutional law and that article 13(2) covered only the former. In *Shankari Prasad* the decision was unanimous of a bench of five judges, whereas in *Sajjan Singh* this view was taken by three judges against two.

In *Golak Nath v. State of Punjab*,³⁸ the Court held by a majority of six to five that Parliament could not amend the constitution so as to take away or abridge the fundamental rights. The majority justices held that the word "law" in article 13(2) included a constitutional amendment and hence a constitutional amendment inconsistent with it would be void.

The strong support of the majority justices in *Golak Nath* for reinstating judicial review of compensation in the property cases, despite the fourth amendment, shows that they were looking at *Golak Nath* as a shield against further erosion of fundamental rights, including the right to property. The process of stopping the future amendments and reading down the existing amendments seems to have a common policy thread. Those judges who conceded unlimited power of constitutional amendment but held in favour of greater judicial review of eminent domain were perhaps more traditional in their approach to constitutional interpretation. There does not seem to be any policy difference in these two sets of judges. Only their conceptions of judicial role were different.

The *Golak Nath* majority justices were pragmatic. They realised that any reinterpretation of the relation between articles 13(2) and 368 might require them to strike down the previous constitutional amendments.

³⁵ CONSTITUTION OF INDIA, art. 368 (as originally enacted). See Appendix, *infra*, at 898.

³⁶ *Shankari Prasad v. Union of India*, [1951] 38 All India Rptr. 458 (Sup. Ct.).

³⁷ *Sajjan Singh v. State of Rajasthan*, [1965] 52 All India Rptr. 845 (Sup. Ct.).

³⁸ [1967] 54 All India Rptr. 1643 (Sup. Ct.).

They did not want to wipe out these amendments since they were the source of so much social reconstruction that had taken place. Therefore, Chief Justice Subba Rao applied the doctrine of prospective overruling and Mr. Justice Hidayatullah applied the theory of social acquiescence to let these amendments continue as valid laws even after the decision.

The *Golak Nath* decision came at a time when the Congress Party had lost its old position of dominance. It held a very slender and shaky majority in Parliament and had lost the majority in more than half of the state legislatures after the fourth general election. The decision came a few days before the election results. Therefore, the amendment of the constitution having become politically difficult, *Golak Nath* came to have a finality.³⁹ Although the late Mr. Nath Pai, a Socialist M.P., introduced a bill to amend the constitution so as to restore to Parliament the power of constitutional amendment, this bill did not make much headway.⁴⁰ After *Golak Nath*, within a few days, Chief Justice Subba Rao resigned to become the opposition's candidate for the presidential election. This was a departure from the past tradition of judges' total insulation from politics and Subba Rao was severely criticised,⁴¹ and he later lost the election. Later in his public lectures he defended the *Golak Nath* decision.⁴² Subba Rao had exploded the myth of a neutralist and apolitical judge.⁴³ We are reminded of the following observations of Cardozo:

The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.⁴⁴

³⁹ See S. SATHE, FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONSTITUTION 61 (1968).

⁴⁰ See the author's comments on this bill in ANNUAL SURVEY OF INDIAN LAW 10-12 (1968); and in *Amendability of Fundamental Rights: Golak Nath and the Proposed Constitutional Amendment*, 1 SUP. CT. J. 33 (1969).

⁴¹ See H. SEERVAI, THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA, 121-22 (1970). According to Seervai, the constitution should be amended to prevent any judge from seeking or obtaining political office. Mr. Seervai was the Advocate General of Maharashtra and apart from being a leading lawyer is a jurist of international fame. His treatise, CONSTITUTIONAL LAW OF INDIA, is a classic on the Indian Constitution and can be compared with the very best books on constitutional law.

⁴² See K. RAO, SOME CONSTITUTIONAL PROBLEMS (1970).

⁴³ See Gadbois, *Indian Supreme Court Justices: A Portrait*, 3 LAW AND SOC'Y REV. 317 (1969), who notes that "a prototype judge . . . refrained from participation in a nationalist movement before 1947 and in post-independence politics thereafter." The neutralist image of the judge was also shaken in the recent controversy over the appointment of Mr. Justice A. N. Ray as Chief Justice in preference to three senior judges. See generally KUMARAMANGALAM, JUDICIAL APPOINTMENTS (1973); ANTULAY, APPOINTMENT OF A CHIEF JUSTICE (1973); HEDGE, CRISIS IN INDIAN JUDICIARY (1973); and PALKHIVALA, A JUDICIARY MADE TO MEASURE (1973).

⁴⁴ B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1932).

IV. PARLIAMENT AMENDS THE CONSTITUTION

After the *Bank* and *Privy Purse*⁴⁵ decisions of the Supreme Court, both of which went against the government, the tension between Parliament and the Court mounted. Prime Minister Indira Gandhi requested the President to dissolve the House and hold mid-term elections. In the Congress Party manifesto it was stated that the party intended to make basic changes in the Constitution.⁴⁶ The party won a landslide victory at the election and secured two-thirds of the total number of seats, much more than the number that is required for bringing about an amendment of the constitution. The functional finality of *Golak Nath* could not be sustained against such a majority in the new Lok Sabha (the lower house).

The government introduced the twenty-fourth constitutional amendment on July 28, 1971. Mr. H. R. Gokhale, Minister of Law and Justice told the Lok Sabha that the bill "again asserts" that Parliament is supreme.⁴⁷ He said they were "under a clear mandate, a massive mandate, from the people" for bringing these amendments "so as to remove the impediments that have been created in the way of the implementation of the fulfilment of our socio-economic programmes."⁴⁸ He said that *Golak Nath* gave prominence to the static element of the constitution at the

⁴⁵ *Madhav Rao Scindia v. Union of India*, [1971] 58 All India Rptr. 530 (Sup. Ct.). The President issued an order withdrawing the recognition of the rulers of the erstwhile princely states. This was done in pursuit of the Congress Party's policy of abolishing the privy purses and princely privileges. An amendment of the constitution to that effect had failed to obtain the support of the required majority. Under clause (22) of article 366 of the constitution, a ruler means the prince, chief or other person by whom any covenant or agreement as is referred to in clause (1) of article 291 was entered into and who for the time being is recognised by the President as the ruler of the state. If a person is not recognised by the President, he automatically loses the rights to a privy purse and the privileges. The President therefore issued an order derecognising the princes. The Supreme Court held by a majority of nine against two that the above order was unconstitutional. Mr. Justice Mitter held that the Court had no jurisdiction and Mr. Justice Ray upheld the government's action. It is significant that Justices Shah, Sikri, Shelat, Vaidialingar and Hidayatullah who voted with the majority were also with the majority in *Golak Nath*. Justice Bhargava had voted for the amendability of fundamental rights. This case has not been included in the above analysis because it technically does not fall within the subject with which the other cases were concerned. But it is interesting that five out of six judges of the *Golak Nath* majority voted against the government in this case. Only one judge, Subba Rao, did not vote because he had retired. As against this, only one judge, Mr. Justice Bhargava, of the minority justices in *Golak Nath* voted against the government. Then it is interesting that eight judges were common to the *Bank* and *Privy* cases. Out of these, four participated in *Kesavaya* and all of them voted for the limited amendability of the constitution.

See generally Imam, *The Privy Purse Case: A Critique*, 13 J. INDIAN LAW INST. 385 (1971); and Roberts, *The Supreme Court in a Developing Society: Progressive or Reactionary Force? A Study of the Privy Purse Case in India*, 20 AM. J. COMP. L. 79 (1972).

⁴⁶ See S. K. TAMBERI, *THE WONDER ELECTION 1971: INDIRA VERSUS THE RIGHT* 94 (1971).

⁴⁷ 7 LOK SABHA DEBATES, No. 53, at col. 146 (5th Series, August 1, 1971).

⁴⁸ *Id.*

cost of its dynamic element embodied in the directive principles of state policy.⁴⁹

The late Mr. Kumaramangalam (Minister of Steel and Mines) said that the philosophy underlying *Golak Nath* was of distrust of the legislature.⁵⁰ He described the Supreme Court as an "undemocratic collection of very respected gentlemen."⁵¹ He taunted the opposition parties like Jan Sangh and Swatantra, which were not openly opposing the bill but were doing so indirectly. He said if they stood by *Golak Nath* they would lose the support of the people, and if they opposed it those who supported might desert them.⁵²

Mr. A. K. Gopalan (Communist Party—Marxist) said that "hindrances . . . from the High Courts and the Supreme Court, would be removed"⁵³ by the passing of this bill. Mr. R. K. Sinha (Congress) said that *Golak Nath* was an attempt to take away the sovereignty of the Indian people.⁵⁴ Indrajit Gupta (Communist Party of India) said the Supreme Court had been oblivious to the directive principles of state policy.⁵⁵ Chandrajit Yadav (Congress) said that *Golak Nath* had stopped the nation's progress.⁵⁶ Mr. Amrit Nahata (Congress) said that *Golak Nath* was a political judgment.⁵⁷ Professor Madhu Dandavate (Social) said that the Court had become the third chamber of the Parliament.⁵⁸ Mr. Sant Bux Singh (Congress) asked, "[is] this country going to take up a position where the judges of the Supreme Court will not only interpret but make the law?"⁵⁹ Mr. Shamin (Congress) said that the Supreme Court judges were not infallible.⁶⁰

Mr. Gopalan pointed out that the Court had upheld restrictions on personal liberty but not on the property rights. He himself had been the victim of the Supreme Court's interpretation where it held that the legislature's power to curb personal liberty was unrestricted.⁶¹ In *Bank* the "class character of the judges came out."⁶² Mr. Kumaramangalam said:

⁴⁹ *Id.* at Col. 151.

⁵⁰ 7 LOK SABHA DEBATES, No. 54, at col. 218 (5th series, August 14, 1971).

⁵¹ *Id.* at col. 233.

⁵² *Id.* at col. 229.

⁵³ 7 LOK SABHA DEBATES, No. 53, at col. 158 (5th series, August 3, 1974).

⁵⁴ *Id.* at col. 164.

⁵⁵ *Id.* at col. 174.

⁵⁶ *Id.* at col. 194.

⁵⁷ *Id.* at col. 215.

⁵⁸ *Id.* at col. 239.

⁵⁹ *Id.* at col. 263.

⁶⁰ *Id.* at col. 269.

⁶¹ A. K. Gopalan v. State of Madras, [1950] 37 All India Rptr. 27 (Sup. Ct.).

⁶² 7 LOK SABHA DEBATES, No. 53, at col. 160 (5th series, August 3, 1971).

We respect our judges. But, we recognise them as men,—men as frail as we are, as prone to commit error, as prone to do good and also bad, as all of us, . . . with an inbuilt conservatism born out of the class from which they come.⁶³

Mr. Sreekantan Nair (C.P.M.) said that the judges came from "the higher strata of society and are isolated from the hopes and aspirations of the common man of today by the gulf of two generations."⁶⁴ He therefore predicted that Parliament would have further opposition from the Supreme Court. He wanted the retirement age of the judges to be lowered so that younger men could be appointed as judges.⁶⁵

A strong support for judicial review came from an independent member, who was formerly India's defense minister, the late V. K. Krishna Menon. He said that so long as there was a constitution, somebody had to interpret it and this could best be done by the Supreme Court.⁶⁶ Nevertheless, he supported the amendment.

Opposition to the bill came from Jan Sangh and Swatantra, India's rightist parties and some other independent members. Mr. Atal Bihari Bajpai, the Jan Sangh leader, said that the Supreme Court's opinion might be obtained upon the proposed act. This would avoid confrontation. He did not admit that Parliament was supreme in every matter. He asked whether Parliament could change democracy into autocracy or could it abolish secularism and set up a theocratic state. He was afraid that the proposed bill would not only abridge the right to property but that all other fundamental rights would be in danger of extinction.⁶⁷ Mr. Frank Anthony, a nominated member representing the Anglo-Indian community, said that not Parliament but the constitution was supreme.⁶⁸ He deplored attacks on judges and their decisions. Mr. H. M. Patel (Swatantra) said that as long as *Golak Nath* stood, the bill could not be passed. He denied that the Court came in the way of progress. He said that if unrestricted power were given to Parliament, it might be abused.⁶⁹

Various amendments to the bill were proposed. Some amendments sought to make constitutional amendment more difficult. For example, K. Manoharan (D.M.K.) wanted an amendment of fundamental rights to be ratified by not less than 75 percent of the state legislatures,⁷⁰ where-

⁶³ *Id.* No. 54, at col. 221-22 (5th series, August 4, 1971).

⁶⁴ *Id.* at col. 246.

⁶⁵ *Id.*

⁶⁶ *Id.* at col. 238.

⁶⁷ 7 LOK SABHA DEBATES, No. 53, at col. 193 (4th series, August 3, 1971).

⁶⁸ *Id.* at col. 207.

⁶⁹ *Id.* at col. 220.

⁷⁰ 7 LOK SABHA DEBATES, No. 54, at col. 337 (5th series, August 3, 1971). The D.M.K. is a regional party in the State of Tamil Nadu (Madras).

as Mr. Shamim suggested ratification by half the state legislatures.⁷¹ These amendments were rejected. There were amendments suggesting that the advisory opinion of the Supreme Court be obtained or the bill be sent for an opinion poll. These latter amendments were also defeated.

Various members tabled amendments seeking to exclude certain fundamental rights from the process of constitutional amendment. Mr. Gopalan wanted the rights of freedom of speech and expression, freedom of assembly and association, and freedom of movement to be protected.⁷² Mr. Frank Anthony wanted the rights of the religious institutions as well as of the minorities to be protected;⁷³ on the other hand, there were amendments for excluding the rights of equality, the provision against untouchability, personal freedoms, religious freedom, and the rights of the minorities from the process of amendment.⁷⁴ All these amendments were rejected. The twenty-fourth amendment was passed by the Lok Sabha by a vote of 384 to 23.⁷⁵

In the Rajya Sabha (the upper house), the bill was passed by a vote of 177 to 8.⁷⁶ Here also several amendments were proposed to exclude certain freedoms from the process of constitutional amendment. Mr. Nageshwara Prasad Sahi wanted the power of constitutional amendment to be confined only to the right to property.⁷⁷ Mr. Abdulla Koya wanted the rights of equality, against untouchability, of personal freedoms, of religious freedom, and of the minorities to be excluded.⁷⁸ Both were rejected. Mr. Rajnarain of the Socialist Party wanted all the rights guaranteed by article 19 except the right to hold, acquire, and dispose of property to be made unamendable.⁷⁹ Mr. N. G. Goray (Socialist) wanted the rights of freedom of speech, freedom of assembly, freedom of association, and right to equality to be excepted.⁸⁰ All of these amendments were defeated.⁸¹

The Constitution (Twenty-fourth) Amendment Act, 1971, made the following changes: (1) in article 13, an additional clause was added which made it explicit that nothing in the article shall apply to any amendment of the constitution made under article 368; (2) the title of

⁷¹ *Id.*

⁷² *Id.* at col. 335.

⁷³ *Id.* at col. 319.

⁷⁴ *Id.* at col. 327.

⁷⁵ *Id.* at col. 425.

⁷⁶ 67 PARLIAMENTARY DEBATES, RAJYA SABHA, at col. 312 (August 11, 1971).

⁷⁷ *Id.* at 240.

⁷⁸ *Id.* at col. 241.

⁷⁹ *Id.* at col. 253.

⁸⁰ *Id.* at col. 254.

⁸¹ *Id.* at col. 281.

part XX of the constitution which formerly read as "Procedure for the amendment of the Constitution" was now changed to "Power of Parliament to amend the Constitution and Procedure therefor;" (3) in clause (1) of article 368 the words "Notwithstanding anything in this Constitution" were added and it was made clear that an amendment by Parliament of the constitution was made in "exercise of its constituent power." Further, instead of the word "amendment," the words "amend by way of addition, variation or repeal" were added, so as to provide maximum possible scope for constitutional amendment; (4) in clause (2) of article 368 the giving of assent was made obligatory upon the President; and (5) it was made clear that nothing in article 13 shall apply to any amendment of the constitution. These changes were made with a view to overcoming the objections raised by the *Golak Nath* majority justices. Items (1) and (5) were intended to get over the objection raised by the *Golak Nath* majority justices that an amendment of the constitution was controlled by article 13(2). Item (3) was provided with a view to avoiding any other interpretation leading to a limited scope of the power of amendment. Item (2) aimed at dispelling Chief Justice Subba Rao's view that article 368 as originally enacted did not contain the power of amendment but contained only the procedure. In *Golak Nath*, the majority justices had found that the two processes, that of constitutional amendment and ordinary legislation, were identical. From this they had further buttressed their view that there was no difference between ordinary law and a constitutional amendment. By dispensing with the President's assent this distinction was made explicit. Item (4) aimed at accomplishing this.⁸²

The Constitution (Twenty-fifth) Amendment Bill was introduced in the Lok Sabha on July 28, 1970. It came for discussion on November 30, 1971. This amendment sought to get over the objections which the Supreme Court had raised in *Bank*. It replaced the word "compensation" in clause (2) of article 31 by the word "amount." The Court had interpreted the word "compensation" to mean the just equivalent of value of the property acquired. The non-normative word "amount," it was hoped, would free the government of any such obligation.⁸³ The amendment made two further changes. First it said that article 19(1) (f) would not apply to the cases of eminent domain covered by article 31(2). Before *Bank*, the Supreme Court had held that the two articles were mutually exclusive.⁸⁴ Since in *Bank* the Court made article 19(1) (f) ap-

⁸² CONSTITUTION OF INDIA, art. 368 (as amended).

⁸³ *Id.*, art. 31(2). See Appendix, *infra*, at 896.

⁸⁴ H. M. SEERVAI, CONSTITUTIONAL LAW 396, n.50 (1968).

plicable to acquisition of property by the state under article 31(2), the above amendment became necessary.⁸⁵ Lastly, Parliament added one more article to the constitution. This article, 31-C, conferred immunity on laws enacted for giving effect to the directive principles of state policy embodied in clauses (b) and (c) of article 39 against invalidity arising from their contravention of the fundamental rights of equality, personal freedoms and the right to property.⁸⁶

Mr. Gokhale, the Law Minister, said that after the amendment it would not be possible for the Court to block the measures of social change by compelling the government to pay a heavy compensation. On the agenda there was "a far-reaching programme aimed at restructuring the entire socioeconomic fabric of our country."⁸⁷ Determination of compensation had been made non-justiciable so that the judges could be kept outside of the political arena.⁸⁸ Mr. Kumaramangalam pointed out that nowhere in the world did democracy require by definition that property could be taken away only at the payment of market value.⁸⁹ He pointed out that there was no intention to harm the small property owners or the minorities.⁹⁰ The word "amount" meant "whatever amount that is considered reasonable and proper by Parliament."⁹¹ Mr. Gokhale clarified in the end once again that the amendment did not make the payment of compensation equal to the full market value impossible. It only gave freedom to Parliament to fix the compensation in the light of factors such as how much profit it had already yielded to the owner, whether it was large or small, and whether it was a means of production.⁹² Prime Minister Indira Gandhi said that social investment which enhanced the value of a property could not be ignored while computing the compensation.⁹³

Mr. Samar Mukherjee (C.P.M.) said that the constitution should be changed lock, stock and barrel.⁹⁴ In his opinion there should be no compensation at all for foreign or local monopolist capitalists.⁹⁵ Mr. Krishna

⁸⁵ The Constitution (Twenty-fifth) Amendment Act added clause 2(B). See Appendix, *infra*, at 896.

⁸⁶ CONSTITUTION OF INDIA, art. 31-c. See also text of article 39(b) and (c) in Appendix, *infra*, at 898.

⁸⁷ 9 LOK SABHA DEBATES, No. 12, at col. 222 (5th series, November 30, 1971).

⁸⁸ *Id.* at col. 225.

⁸⁹ *Id.* at col. 306.

⁹⁰ *Id.* at col. 311.

⁹¹ *Id.* at col. 313.

⁹² *Id.*, No. 13, at col. 409 (5th series, December 1, 1971).

⁹³ *Id.* at cols. 345-46.

⁹⁴ 9 LOK SABHA DEBATES, No. 12, at col. 233 (5th series, November 30, 1971).

⁹⁵ *Id.* at col. 234.

Menon was not sure that by the insertion of the word "amount" the government would be able to escape the Court's objections.⁹⁶ Mr. Samar Guha (Socialist) said that there must exist some criteria for compensation, and the function of "keeping an eye to the criterion" must be entrusted to the Court.⁹⁷

Dealing with article 31-C, Mr. Gokhale pointed out that the Supreme Court had in the past used the right of freedom of speech to invalidate laws which aimed at eliminating the monopolies in press ownership.⁹⁸ Therefore the government could not accept the Law Commission's recommendation to confine the immunity only against the property rights. Regarding the finality clause, Mr. Gokhale said that the courts would even then have the power to object to colourable legislation, because they could examine whether there was a nexus between a law and the directive principles. It was not fair to the courts to ask them to review whether a law gave effect to those directive principles because that was essentially a political question.⁹⁹

Mr. Frank Anthony described the provision as "monstrous." According to him "it subverts the whole basic fundamental character of the Constitution."¹⁰⁰ Mr. Piloo Modi criticised the government for promoting monopolies and concentration of wealth through its wrong licensing policies and half-hearted fiscal efforts.¹⁰¹

A number of amendments were proposed to the bill.¹⁰² All were rejected. The government moved an amendment whereby it was stated that no property belonging to an educational institution of a minority shall be acquired without paying an amount which would be determined with due regard to the cultural and educational rights of the minorities guaranteed by article 30.¹⁰³ This was passed.

The Constitution (Twenty-fifth) Amendment Act, was passed in the Lok Sabha by a vote of 353 to 20.¹⁰⁴ In the Rajya Sabha, it was passed by a vote of 166 to 20.¹⁰⁵

⁹⁶ *Id.*, No. 13, at col. 409 (5th series, December 1, 1971).

⁹⁷ *Id.* at col. 323.

⁹⁸ 9 LOK SABHA DEBATES, No. 12, at col. 228 (5th series, November 30, 1971).

⁹⁹ *Id.* at col. 229.

¹⁰⁰ 6 LOK SABHA DEBATES, No. 48, at col. 299 (5th series, July 28, 1971).

¹⁰¹ 9 LOK SABHA DEBATES, No. 12, at cols. 278-79 (5th series, November 30, 1971).

¹⁰² One proposed amendment was for circulating the bill among the public to elicit opinion. This amendment was defeated. *Id.*, No. 13, at col. 366 (5th series, December 1, 1971). Another proposed amendment was to send the bill to the supreme court for an advisory opinion. This amendment was also defeated. *Id.*

¹⁰³ *Id.* at col. 381.

¹⁰⁴ *Id.* at col. 523.

¹⁰⁵ 78 PARLIAMENTARY DEBATES, RAJYA SABHA, No. 19, at col. 186 (December 8, 1971).

Parliament then passed the Constitution (Twenty-ninth) Amendment Act, which conferred immunity on two laws of the Kerala state against challenge on the ground of their inconsistency with any of the fundamental rights by including them in the Ninth Schedule.¹⁰⁶

V. KESAVANANDA BHARTAI—BACK TO THE COURT

Under one of the Kerala Acts, the properties of His Holiness, Kesavananda Bharati, were to be acquired by the state. The petitioner had moved the Supreme Court under article 32 of the constitution¹⁰⁷ against one of these acts. By the Constitution (Twenty-ninth) Amendment Act, the act against which the above petition was pending was included in the Ninth Schedule. This prevented the petitioner from challenging its constitutionality. The petitioner therefore challenged the validity of the constitutional amendment itself. However, in order to challenge its validity, he had to attack the twenty-fourth amendment. Some other petitioners also joined him and they attacked the twenty-fifth amendment. All of these petitions came together for hearing before the largest bench of the Supreme Court, consisting of thirteen judges, in *Kesavananda Bharati v. State of Kerala*.¹⁰⁸

The issues which the Court was called upon to decide were mainly the following: (1) was *Golak Nath* rightly decided; (2) were there any limits to Parliament's power of constitutional amendment; and (3) were the impugned constitutional amendments valid.

A. *Was Golak Nath rightly decided?*

Ten out of thirteen judges who heard the case held that *Golak Nath* had been wrongly decided. Only Chief Justice Sikri and Mr. Justice Shelat, who wrote a judgment on behalf of himself and Mr. Justice Grover, did not give any conclusive opinion. According to Chief Justice Sikri, it was not necessary to decide whether *Golak Nath* was rightly decided, because the real issue was the extent of the amending power conferred by article 368.¹⁰⁹ Mr. Justice Shelat observed that the *Golak Nath* decision had become academic "because even on the assumption that the majority decision in that case was not correct, the result on the questions now raised . . . would just be the same."¹¹⁰ These judges were parties to

¹⁰⁶ See CONSTITUTION OF INDIA, article 31-B, in Appendix, *infra*, at 898.

¹⁰⁷ CONSTITUTION OF INDIA, art. 32, guarantees the right to move the supreme court for the enforcement of fundamental rights.

¹⁰⁸ [1973] 60 All India Rptr. 1461 (Sup. Ct.).

¹⁰⁹ *Id.* at 1489.

¹¹⁰ *Id.* at 1566.

the *Golak Nath* majority decision and therefore their avoidance of this question can be well appreciated.¹¹¹ All the other judges held that there was a distinction between constitutional law and ordinary law and that since an amendment of the constitution was constitutional law, it could not come within the scope of article 13 (2).¹¹²

B. *Scope of Parliament's Power of Constitutional Amendment*

The petitioners as well as the respondents presented their sides with arguments which had political overtones. For example Mr. Chief Justice Sikri, while summarising the contentions of both sides, said:

The respondents claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions and freedom of religion. They claim that democracy can even be replaced and one-party rule established. Indeed, short of repeal of the Constitution, any form of Government with no freedom to the citizens can be set up by Parliament by exercising its powers under article 368.¹¹³

Similarly, Mr. Justice Shelat, who wrote a judgment on behalf of himself and Mr. Justice Grover stated in the beginning that "the respective positions adopted by learned counsel for the parties diverge widely and are irreconcilable." Then while stating the position of the respondents, Mr. Justice Shelat said:

The respondents, on the other hand, claim an unlimited power for the amending body. . . . It is claimed that democracy can be replaced by any other form of government which may be wholly undemocratic, the federal structure can be replaced by a unitary system . . . and the right of judicial review can be completely taken away.¹¹⁴

It is respectfully submitted that the respondents should have argued that there were no legal limits to the power of constitutional amendment. In fact, the respondents need not have conceded that short of total abrogation or repeal there was no limitation on the power of constitutional amendment. Seervai has supported the above concession with legal argu-

¹¹¹ See Tripathi, *Kesavananda Bharati v. State of Kerala, Who Wins?*, 1 SUP. CT. CASES 1, 6 (1974), which suggests that these judges overruled *Golak Nath* by implication.

¹¹² Most of the academic writings since *Golak Nath* have noted this point. See, e.g., H. M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 1099 (1967); P. B. GAJENDRAGADKAR, THE INDIAN PARLIAMENT AND FUNDAMENTAL RIGHTS (1972); S. P. SATHE, FUNDAMENTAL RIGHTS AND AMENDMENT OF THE INDIAN CONSTITUTION (1968); H. CHAND, AMENDING PROCESS UNDER THE INDIAN CONSTITUTION (1972); and P. K. TRIPATHI, SOME INSIGHTS INTO FUNDAMENTAL RIGHTS, *Lecture 1*, "Golak Nath: A Critique" (1972).

¹¹³ *Kesavananda Bharati v. State of Kerala*, [1973] 60 All India Rptr. 1461, 1490 (Sup. Ct.).

¹¹⁴ *Id.* at 1566.

ments in his recent article.¹¹⁵ But this very concession was used by the majority justices to arrive at the conclusion that there were implied limitations on Parliament's power of constitutional amendment. For example, Mr. Justice Shelat concluded that "the amending body under Article 368 cannot have the same powers as a Constituent Assembly."¹¹⁶ It is one thing to say that Parliament has power to amend the constitution and quite different to say that it can change democracy and set up a one-party rule. In fact, there is a contradiction in the above statements. If there is Parliament, how can there be monarchy or one-party rule? As long as Parliament functions in its representative capacity, such questions need not arise. Parliament, being a representative body, is bound to work subject to constraints which are built into the democratic process. Where such constraints break down, we wonder how long a court will be able to withstand the pressure of undemocratic forces.

These judges observed that the American case law on the question of amendability was not relevant to India because according to the Constitution of the United States an amendment cannot be made by Congress alone. It is made by Congress and is required to be ratified by three-fourths of the states either through their legislatures or through conventions called for that purpose.¹¹⁷ The Indian Constitution on the other hand can be amended by Parliament alone. Chief Justice Sikri observed that "if a proposal is made by the Congress and ratified by conventions there cannot be any doubt that it is the people who have amended the Constitution." Similarly, an amendment proposed by Congress and ratified by the state legislatures could also be equated with the action of the people. As against this, could it be said that an amendment of the Indian Constitution was made by the people?¹¹⁸ Mr. Justice Hedge went still further. He said:

Two thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of the people of this country. Our electoral system is such that even a minority of voters can elect more than two thirds of the members of the either House of Parliament.¹¹⁹

Mr. Justice Reddy said that although the Constituent Assembly was not elected on adult franchise, it was nonpartisan whereas Parliament was

¹¹⁵ Seervai, *The Fundamental Rights Case at the Cross Roads*, 75 BOMBAY L. RPTR. 47 (1973).

¹¹⁶ *Kesavananda Bharati v. State of Kerala*, [1973] 60 All India Rptr. 1461, 1585 (Sup. Ct.).

¹¹⁷ U.S. CONST., art. V.

¹¹⁸ *Kesavananda Bharati v. State of Kerala*, [1973] 60 All India Rptr. 1461, 1541 (Sup. Ct.).

¹¹⁹ *Id.* at 1624.

bound to be partial.¹²⁰ It is respectfully submitted that these justices challenged the basic assumptions underlying constitutional government. The constitution which created the Supreme Court also created Parliament and also the electoral system. The basic assumption of the constitution is that Parliament represents the people.

From Mr. Justice Reddy's judgment we learn that even the attorney general who represented the state's case fell prey to the argument regarding the lack of representative character in Parliament. He argued that the people had not been given part in the amending process because as they were "illiterate and untutored they would not be able to take part in that process with proper understanding or intelligence."¹²¹ From this the learned judge drew a conclusion that if sovereignty lay in the amending provision, the people would never participate in constitution-making.¹²² It is submitted that the reason for not giving participation to the people is not that they are illiterate. If that is the reason, then they are not fit for democracy. The people have been given participation through their representatives elected through adult franchise. In a country of India's size it is unrealistic to talk of direct participation of the people in law making.

Mr. Justice Khanna replied to the above objection rightly when he said that "the decision as to which method of amending the Constitution should be chosen has necessarily to be that of the Constituent Assembly."¹²³ Selection having been made it is not for a court to say that a particular method is good or bad. He further said that the argument that the power of amendment might be abused was "essentially an argument of fear and distrust in the majority of representatives of the people."¹²⁴ Mr. Justice Khanna further said that the best safeguard against abuse of power was public opinion. If under the sway of some overwhelming impulse a climate was created whereby those rights were abrogated, it was doubtful how far a restricted interpretation of article 368 could help.¹²⁵ He pointed out that there were various provisions in the constitution which could be abused. For example, during an emergency all fundamental rights could be suspended. Parliament could also extend its life indefinitely though only for a year at a time.¹²⁶

Mr. Justice Khanna started with greater faith in the legislature. His conclusion that the basic structure of the constitution could not be abro-

¹²⁰ *Id.* at 1738-39.

¹²¹ *Id.* at 1737.

¹²² *Id.*

¹²³ *Id.* at 1853.

¹²⁴ *Id.* at 1855.

¹²⁵ *Id.* at 1857.

¹²⁶ *Id.* at 1859.

gated was based not on possible abuse of power or in the unrepresentative character of Parliament but on the premise that a constitution is intended to be permanent. He too, like the other six judges, seems to have decided to cry a halt to the further mutilation of the constitution as was undertaken by article 31-C. Therefore he held that the basic structure of the constitution could not be destroyed.

Six justices, Ray, Mathew, Beg, Dwivedi, Palekar and Chandrachud held that there were no limitations on Parliament's power of constitutional amendment.

Mr. Justice Ray observed that "democracy proceeds on the faith and capacity of the people to elect their representatives."¹²⁷ Mr. Justice Mathew observed that the assertion that the constitution was made by the people was only "a rhetorical flourish."¹²⁸ He pointed out that "in no country, except perhaps in a direct democracy, can the people *en masse* be called legally sovereign."¹²⁹ He stressed that when Parliament amends the constitution, it is "as much the guardian of the liberties of the people as the courts."¹³⁰ Mr. Justice Dwivedi said "the Constitution does not recognise the supremacy of this Court over Parliament."¹³¹ Mr. Justice Chandrachud also urged the importance of trusting the elected representatives.¹³²

Thus we have a wide spectrum of opinions on the extent of the amenability of the constitution. On the one end of the spectrum, we have six judges, Chief Justice Sikri, and Justices Shelat, Hegde, Grover, Mukherjea and Reddy (we shall call them the Sikri group) holding the view that there are implied limitations on Parliament's power of constitutional amendment. According to these judges, the basic features of the constitution cannot be abrogated. These judges used the terms "basic features" and "basic structure" interchangeably.

According to Chief Justice Sikri, the following are the basic features: (1) supremacy of the Constitution; (2) republican and democratic form of government; (3) secular character of the constitution; (4) separation of powers; (5) federal character and (6) dignity and freedom of the individual.¹³³ Mr. Justice Shelat, in addition to the above six, also includes (7) the unity and integrity of the nation and (8) the mandate

¹²⁷ *Id.* at 1649.

¹²⁸ *Id.* at 1922.

¹²⁹ *Id.* at 1923.

¹³⁰ *Id.* at 1938.

¹³¹ *Id.* at 2008.

¹³² *Id.* at 2042.

¹³³ *Id.* at 1535.

given to the state in the directive principles of state policy.¹³⁴ Mr. Justice Hegde almost agrees with the above enumeration though differing in detail slightly. He made it clear that these limitations were only "illustrative."¹³⁵ Mr. Justice Reddy held the following to be the basic features of the constitution: (1) sovereign and democratic republic; (2) social, economic and political justice; (3) liberty of thought, expression, faith, belief and worship; (4) equality of status and of opportunity. "To withdraw any one of the above elements the structure will not survive and it will not be the same Constitution."¹³⁶ "What then are the essential features or the basic elements comprising the structure of our Constitution need not be considered in detail as these will fall for consideration in any concrete case where they are said to have been abrogated and made non-existent."¹³⁷ He however opined that fundamental rights were basic and could not be abrogated by a constitutional amendment.¹³⁸

Mr. Justice Khanna's position is different from the above six judges. He gives a far greater latitude to Parliament when he says:

As a result of the amendment, the old constitution cannot be destroyed and done away with . . . What then is meant by the retention of the old constitution? It means the retention of the basic structure or framework of the old constitution.¹³⁹

While elaborating this he says that it would not be permissible to abolish the Lok Sabha and the Rajya Sabha. According to him the right to property does not pertain to the basic structure. It is "a matter of detail."¹⁴⁰

Mr. Justice Khanna seems to be in agreement with the judges of the Ray group in so far as his attitude towards Parliament is concerned. He agrees that "no generation has monopoly of wisdom nor has any generation a right to place fetters on future generations to mould the . . . laws according to their requirements;"¹⁴¹ that a peaceful method of constitutional change is preferable to the violent method;¹⁴² that "the best safeguard against the abuse of power is public opinion;"¹⁴³ that if the people "decide to have an entirely new constitution, they would not need the au-

¹³⁴ *Id.* at 1603.

¹³⁵ *Id.* at 1628.

¹³⁶ *Id.* at 1753.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1755.

¹³⁹ *Id.* at 1860.

¹⁴⁰ *Id.* at 1881.

¹⁴¹ *Id.* at 1849.

¹⁴² *Id.* at 1851.

¹⁴³ *Id.* at 1857.

thority of the existing constitution."¹⁴⁴ However, he finds limitations in the constitution itself on the power of constitutional amendment. It is respectfully submitted that his position that the basic structure of the constitution cannot be altered does not seem to go well with his position generally regarding the parliamentary process. He could have gone at the most as far as up to what the state had conceded, that the power of constitutional amendment did not include the power to repeal or abrogate the entire constitution. But having rejected the doctrine of implied limitations, the learned judge in effect found such limitations on the power of Parliament. This he did most probably because he, like the other six judges, dreaded the ghastly effects of article 31-C.¹⁴⁵

As we move further right of Mr. Justice Khanna, we have three judges, Beg, Mathew and Dwivedi, who doubted whether the power of constitutional amendment extended to total repeal or abrogation of the entire constitution at one stroke.¹⁴⁶ However, they joined the other three judges, Ray, Palekar and Chandrachud, in holding that there were no limitations on Parliament's power of constitutional amendment.

Thus we have seven judges holding that there were limits to Parliament's power of constitutional amendment, and that such limits would be enforced through judicial review. It is interesting that five of these seven judges, namely, Sikri, Shelat, Grover, Hegde and Reddy, had voted to strike down the bank nationalisation law. Further, four of them—Sikri, Shelat, Hegde and Grover—had also struck down the government's order de-recognising the princes. The other two judges, Mukherjea and Khanna, of the *Kesavananda* majority had not participated in the above decisions. Among the minority justices, only Mr. Justice Ray had voted in favour of the law in *Bank* and in favour of the government's order in the *Privy Purse* case.

C. *Validity of the Impugned Amendments*

The twenty-fourth amendment was upheld by all thirteen judges. Six judges of the Sikri group and Mr. Justice Khanna held that the amendment had not in any way altered the basic features or basic structure of the constitution. However, since the original constitution itself limited the power of constitutional amendment, that power in itself could not be enlarged. The twenty-fourth amendment had not done so. The Sikri group judges held that the fundamental rights were basic features. They

¹⁴⁴ *Id.* at 1861.

¹⁴⁵ See Seervai, *supra* note 115, at 29.

¹⁴⁶ *Kesavananda Bharati v. State of Kerala*, [1973] 60 All India Rptr. 1461, 1979, 1910, 1997 (Sup. Ct.).

observed that what the twenty-fourth amendment did was to authorise the amendment of fundamental rights to the extent of their abridgment but not extending to their abrogation. It is submitted that mere abridgment will not need a constitutional amendment since the constitution contains provision for abridgment.

Regarding the twenty-fifth amendment, six judges of the Sikri group and Mr. Justice Chandrachud of the Ray group held that despite the word "amount," the Court had the power to examine whether the amount was illusory or the principles for fixing the amount were irrelevant.¹⁴⁷ According to the judges of the Sikri group the twenty-fifth amendment could be valid only if it was so interpreted.¹⁴⁸ Mr. Justice Chandrachud did not make the validity of the amendment contingent on such interpretation, but according to him there was "intrinsic evidence in Article 31(2) that it does not empower the State to confiscate or expropriate property."¹⁴⁹ If the legislature wanted to do that it could have easily said so in clear words.¹⁵⁰

Five judges, Khanna, Ray, Mathew, Dwivedi and Beg, held that the judicial review of compensation had been totally excluded by the twenty-fifth amendment. Mr. Justice Palekar observed that "one cannot anticipate any such matters and strike down an amendment which, in all conscience, does not preclude a fair amount being fixed."¹⁵¹ It is submitted that since the judge had voted in favour of the unlimited power of constitutional amendment, a question regarding the validity of the amendment could not arise.

Article 31-C consisted of two parts. The first part conferred immunity on the laws enacted for the purpose of preventing the concentration of wealth and the use of the means of production to the common detriment, and promoting the distribution of ownership and control of the material resources so as to best subserve the common good, against attack on the ground of their inconsistency with the fundamental rights of equality, personal freedoms, and right to property. The second part made the leg-

¹⁴⁷ Mr. Chief Justice Sikri wondered what meaning could be given to the word "amount." The word "amount" meant "something to be given in lieu of the property to be acquired but this amount has to and can be worked out by laying down certain principles. These principles must then have a reasonable relationship to the property which is sought to be acquired. If this is so, the amount ultimately arrived at by applying the principles must have some reasonable relationship with the property to be acquired." *Id.* at 1554.

¹⁴⁸ *Id.* "If I were to interpret Art. 31(2) as meaning that even an arbitrary of illusory or grossly low amount could be given, . . . a serious question would arise whether Parliament has not exceeded its amending power."

¹⁴⁹ *Id.* at 2051.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1824.

islature's declaration, that a law gave effect to the directive principles, conclusive.¹⁵²

Chief Justice Sikri and Justices Shelat, Hegde, Grover and Mukherjea held the entire article invalid. That article abrogated the fundamental rights and by giving the power to the state legislatures to pass laws inconsistent with the fundamental rights, in effect, delegated the power of constitutional amendment to the state legislatures. It was therefore void. Mr. Justice Reddy held the first part of the article valid if the words "inconsistent with or takes away" used in respect of the fundamental rights and the words "article 14" were omitted. In his opinion the above elements constituted the transgression of the limits of the amending power of Parliament.¹⁵³ Since this objectionable part could be separated from the rest of the article, the remaining portion was valid. However the second part was invalid.¹⁵⁴ Mr. Justice Khanna held only the second part of that article invalid.¹⁵⁵ The majority decision therefore was that only the second part of article 31-C was invalid.

The dissenting justices of the Ray group upheld the entire article. This was in keeping with their view that Parliament's power of constitutional amendment was unlimited. These justices however held that, despite the finality clause contained in the second part of the article, the courts had the power to examine whether a law was relevant to the implementation of the directive principles. These justices drew a distinction between the nexus between a law and the directive principles and the necessity of the law for the implementation or the fact of implementation of the directive principles. While the former could be examined, the latter, in view of the finality clause, could not be examined. These justices used the traditional method which courts often use against finality clauses in order to keep their power intact.

CONCLUSION

The above account suggests that both the Supreme Court and Parliament claimed supremacy *vis-a-vis* each other. *Golak Nath* amply illustrated that the Court cannot establish its supremacy through legal logic alone. In *Kesavananda* the Court has once again attempted to do the same. Both Parliament and the Supreme Court debated with great zeal the question of the sovereignty of the people. Parliament claimed that it alone spoke on behalf of the people. The Supreme Court on the other

¹⁵² See Appendix, *infra*, at 898.

¹⁵³ *Kesavananda Bharati v. State of Kerala*, [1973] 60 All India Rptr. 1461, 1773 (Sup. Ct.).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1902.

hand questioned this premise. It is submitted that all talk of sovereignty of the people in the Indian situation tends to be highly academic and only emotive. In fact this could be said even about many advanced nations and therefore could be said with much greater force about India, where the majority of the people are still illiterate, poor, and tend to accept the inherited lot. Parliament as well as the Supreme Court are elitist institutions which are engaged in bringing about modernisation, economic and social justice and consciousness of liberty to the Indian people. Both can work towards these ideals. But in the writer's opinion, their fields are different. The Supreme Court need not be a contender for the constituent power. Supreme Court decisions can acquire only functional finality. While Parliament responds to popular demands, the Court protects the political minorities and educates the public by making vocal and audible the enduring values which are the basis of a free society. Whereas Parliament requires a two-thirds majority to amend the constitution, a judicial decision will become final if it generates the support of that significant minority of Parliament's membership which can successfully resist constitutional amendment. The debates in Parliament show that there was a strong minority opinion in favour of excluding certain fundamental rights from the process of constitutional amendment. The Court must try to cultivate the support of such a minority for its decisions. This will depend upon the social legitimacy of the judicial decisions.

If the Court holds that in the absence of legal aid equal protection of law is meaningless, the government will be forced to take steps for providing legal aid to the poor. If instead of doing so it tries to amend the constitution, its socialistic pretensions would stand exposed. Similarly, the Court can lend greater protection to personal freedoms such as freedom of speech or freedom of association. These decisions of the Court are bound to acquire functional finality in view of their importance. They would also strengthen the democratic process. Unfortunately the Indian Supreme Court has not been liberal enough in respect of these freedoms. We can give only two instances to support this view. Mr. Namboodripad, a communist leader, was convicted for contempt of court for having made statements about the judicial system which were purely innocuous. The Supreme Court, which upheld this conviction, did not appreciate that what was sacrificed was freedom of speech and that the law of contempt of court needed to be interpreted in such a way as to be compatible with this freedom.¹⁵⁶ Similarly, the Supreme Court of India upheld a ban on the sale of D. H. Lawrence's *Lady Chatterley's Lover*

¹⁵⁶ E. M. S. Namboodripad v. T. N. Nambiar, [1970] 57 All India Rptr. 2015 (Sup. Ct.). See this author's comments in 5 ECON. & POL. WEEKLY 1741-42 (October 17, 1970).

under the law of obscenity.¹⁵⁷ It is submitted that the Court was too much of a strict constructionist in so far as these rights are concerned. It is only on the right to property that the Court gave libertarian interpretations. But in view of the low priority of this right in the Indian scale of values the Court decisions came under heavy fire. Libertarian stands of the Court on other fundamental rights will not only gain a finality for the Court's decisions, but also will act as a restraint on democracy and ultimately compel those in authority to implement the directive principles of state policy with greater sincerity. The Court and Parliament will then compete and co-operate in making democracy more meaningful to the multitude.

In the end we can say that the conflict between Parliament and the Supreme Court appears to be mainly institutional. Their conflicting positions on right to property may appear to have contradictory ideological stances. But neither is Parliament committed to the abolition of private property, nor is the Supreme Court bent upon forestalling the social and economic change which the constitution visualises. The institutional conflict is often explained away in ideological idiom. The Court could show greater deference to the will of the legislature in matters of private property and Parliament could show greater patience with judicial review. There is nothing unusual in such an institutional conflict; it often arises in a democratic government where the power of decision-making is divided. However, it must be contained within limits so that it can be utilized as an effective check on both institutions, but does not subject the constitutional government to an unbearable strain.

APPENDIX

CONSTITUTION OF INDIA

A. *Property Rights*

Article 31

- (1) No person shall be deprived of his property save by authority of law.
- (2) [Originally enacted] No property, movable or immovable, including any interest in, or in any company, owning any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either

¹⁵⁷ See *Ranjit D. Udeshi v. State of Marashtra*, [1965] 52 All India Rptr. 881 (Sup. Ct.). Similarly on prior censorship of films, see *K. A. Abbas v. Union of India*, [1971] 58 All India Rptr. 481 (Sup. Ct.), noted in *Sathe*, 7 ANNUAL SURVEY OF INDIAN LAW 120 (1971). On obscenity, see *K. M. Sharma, Obscenity and the Law*, THE ROOTS OF OBSCENITY 41 (1967); and *Rao, Obscenity, Literature, and the Law*, THE ROOTS OF OBSCENITY 66 (1967).

fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

(2) [As amended by the fourth amendment] No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

(2) [As amended by the twenty-fifth amendment] No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:

Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1) of article 30, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property.

(2B) Nothing in sub-clause (f) of clause (1) of article 19 shall affect any such law as is referred to in clause (2).

(3) No such law as is referred to in clause (2) made by the Legislature of a State shall have effect unless such law, having been reserved for the consideration of the President, has received his assent.

(4) If any Bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such Legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2).

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property.

(6) Any law of the State enacted not more than eighteen months before the commencement of this Constitution may within three months from such commencement be submitted to the President for his certification; and thereupon, if the President by public notification so certifies, it shall not be called in question in any court on the ground that it contravenes the provisions of clause (2) of this article or has contravened the provisions of sub-section (2) of section 299 of the Government of India Act, 1935.

Article 31-A. Saving of laws providing for acquisition of estates, etc.—(1) Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) In this article,—

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Tamil Nadu and Kerala, A *janmam* right;

(ii) any land held under *ryotwari* settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

(b) the expression "rights" in relation to an estate, shall include any

rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, *raiyat*, *under-raiyat* or other intermediary and any rights or privileges in respect of land revenue.

Article 31-B. Validation of certain Acts and Regulations.—Without prejudice to the generality of the provisions contained in article 31 A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

Article 31-C. Saving of laws giving effect to certain directive principles.—Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy;

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Article 39. Certain principles of policy to be followed by the State.—The State shall, in particular, direct its policy towards securing—

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

B. Amendment of the Constitution

Article 368

[As Originally enacted]. *Procedure for amendment of the Constitution.*—An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

(a) article 54, article 55, article 73, article 162 or article 241, or

(b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

(c) any of the Lists in the Seventh Schedule, or

(d) the representation of States in Parliament, or

(e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than

one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

[Amended by the twenty-fourth amendment] Power of Parliament to amend the Constitution and procedure therefor.—(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in—

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in article 13 shall apply to any amendment made under this article.